

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

**PLAINTIFF ePLUS INC.'S MOTION TO STRIKE ATTORNEY DECLARATION OF
ROBERT A. KALINSKY, ESQ. AND OTHER EVIDENCE OR ARGUMENT
RELATING TO NON-FINAL REEXAMINATIONS OF THE PATENTS-IN-SUIT**

Pursuant to Fed. R. Ev. 402 and 403, Plaintiff *ePlus* Inc. (“*ePlus*”) respectfully requests that the Court strike and exclude from evidence or argument the Declaration of Robert A. Kalinsky, Esq. (DX485), and any other evidence or argument pertaining to the non-final U.S. Patent and Trademark Office (“PTO”) reexaminations of the patents-in-suit. Mr. Kalinsky is an attorney with Merchant & Gould, P.C., outside counsel for Defendant Lawson Software, Inc. (“Lawson”) in this litigation and in the *inter partes* PTO reexamination proceedings for two of the patents-in-suit. In his declaration, Mr. Kalinsky purports to testify with respect to and characterize the interim findings of the PTO examiner in connection with the four reexamination proceedings for the patents-in-suit. *ePlus* further requests that the Court strike and exclude from evidence the following exhibits relating to the pending reexamination proceedings: DX237 – 243, DX488 – 491, and DX493.

For several reasons, this “evidence” is not relevant and has no probative value with respect to *ePlus*’s motion for a permanent injunction. First, the jury has already determined that the asserted claims are not invalid, and none of the four reexamination proceedings have resulted

in a final determination that any asserted claim is invalid. The interim findings made in the preliminary stages of such proceedings have no probative value, and there will not be any final determination adverse to *ePlus* from the PTO reexaminations for many years, if at all. Because reexamination requests are routinely granted, to deny an injunction based on non-final reexamination proceedings initiated by accused infringers as a litigation tactic would effectively provide any accused infringer with a “get out of jail free” card in nearly every patent case.

Second, the PTO reexamination proceedings are not relevant to any of the four factors upon which the Court should determine whether to grant a permanent injunction.

Third, the PTO reexaminations employ different claim construction principles, different burdens of proof, and different evidentiary procedures than does this federal court litigation.

ePlus therefore respectfully requests that the Court strike and exclude the Kalinsky Declaration and any other reexamination “evidence” or argument in connection with the injunction proceeding. The bases for this motion are set forth in further detail in the accompanying brief in support.

Respectfully submitted,

March 28, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2011, I will electronically file the foregoing

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with the Clerk of Court using the CM/ECF system which will then send a notification of such filing (NEF) via email to the following:

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